No. 447.

Supreme Court of the United States

OCTOBER TERM, 1948

WHEELING STEEL CORPORATION,
Appellant,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,
Appellee.

REPLY BRIEF FOR APPELLANT

CARLTON S. DARGUSCH;
JOHN M. CAREN,
Columbus, Ohio,
WRIGHT HUGUS,
J. E. BRUCE,
Wheeling, W. Va.,
Attorneys for Appellant.

Of Counsel:
DARGUSCH, CAREN, GREEK & KING,
44 E. Broad St., Columbus 15, Ohio.
SCHMIDT, HUGUS & LAAS,
Central Union Bldg., Wheeling, W. Va.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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REPLY BRIEF FOR APPELLANT

There are several statements and arguments made in the Brief of Appellee which tend to becloud the issues and require some clarification.

1. The Construction of Sections 5328-1 and 5328-2 by the Supreme Court of Ohio.

The discussion of the meaning of Sections 5328-1 and 5328-2 in the Brief of Appellee appears to be designed to create the impression that behind the decision of the Court in the instant case is a long record of consistent

administrative construction of the statutes and judicial approval thereof. That is not the case. The Court gave Sections 5328-1 and 5328-2 a new meaning in 1944 in two cases involving the receivables of residents (*Ransom & Randolph Co.* v. *Evatt*, 142 O. S. 398, and *Haverfield Co.* v. *Evatt*, 143 O. S. 58), and applied that meaning to receivables belonging to nonresidents for the first time in 1948 (*National Distillers Products Corp.* v. *Glander*, *Wheeling Steel Corp.* v. *Glander*, *United States Gypsum Co.* v. *Evatt*, 150 O. S. 229.)

Sections 5328-1 and 5328-2, General Code, became effective in 1932 and until construed by the Ohio Supreme Court, for the first time, in *Ransom & Randolph Co.* v. *Evatt* (1944), 142 O. S. 398, were interpreted and administered by the Tax Commissioner and his predecessor, the Tax Commission of Ohio, in conformity with the generally accepted principles of the concept of *business situs*.[1] This administrative construction was formalized on July 25, 1939, as required by a newly enacted statute,[2] by the filing in the office of the Secretary of State of Ohio of the Tax Commissioner's Rule No. 204.[3]

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1. See Tax Commission v. Kelley-Springfield Tire Co., 38 O. App. 109 (cert. den. 3-25-31).

2. Section 1464-4.

3. "Accounts receivable acquire a situs for taxation in a state other than that of the residence of the owner when such accounts receivable (a) 'arise out of business' in a state other than that in which the owner thereof resides and (b) are 'used in business' in a state other than that in which the owner thereof resides.

Accounts receivable shall be deemed to 'arise out of business' in a state other than that in which the owner thereof resides, in any one of the following classes of cases:

(a) When resulting from the sale of property sold by an agent having an established office in a state other than the residence of the owner.

A sale may be considered to be made 'by an agent', only if and when the agent has authority to bind his principal by entering into a contract of sale binding such principal; that is, if the agent's duty

In the *Ransom & Randolph* case, the Court invalidated the Tax Commissioner's rule and decided that the statutes in question mean that the receivables of a resident are exempt from taxation in Ohio (1) if used in business anywhere, and (2) if resulting (a) from the sale of property sold by an agent having an office in another state, or (b) from the sale of property from a stock of goods maintained in another state. Thus the Ohio Court dispensed with common law *business situs*.[4]

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is merely to solicit and receive orders of the particularly designated character in question, such orders being accepted by his principal at an office in a state other than that in which the order is taken, the transaction is not a 'sale by an agent.'

(b) When resulting from the sale of property from a stock of goods maintained in a state other than the residence of the owner.

(c) When resulting from services performed by the owner's agent or employee connected with, sent from or reporting to the owner's office located in a state other than that in which the owner resides.

Accounts receivable shall be deemed to be 'used in business' in a state other than the residence of the owner thereof when such accounts are subject to the control and management of an officer or agent of the owner at an office in a state other than that in which the owner thereof resides.

The foregoing rule applies reciprocally—that is whether Ohio is the residence or domicile of the owner or whether the owner resides or is domiciled in a foreign state."

(This rule is substantially the same as Amended Regulation No. 6, adopted February 20, 1934 by the Tax Commission of Ohio.)

4. "By the foregoing rule (Rule No. 204) the Tax Commissioner has attempted to add to the statutory requisite for out-of-state situs of accounts receivable, a condition similar to that contained in Section 5328-2, General Code, respecting deposits. The only statutory conditions for out-of-state situs of accounts receivable are that they shall be used in business and shall result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein (Section 5328-2, General Code). Nowhere in the statutes can be found the provision that such accounts receivable are to be 'subject to the control and management of an officer or agent of the owner at an office in a state other than that in which the owner thereof resides.' However we think that the accounts receivable in this case meet this test.

The decision below went further than the commissioner's rule or the statutes in holding in effect that the accounts receivable or the

The Court affirmed its position in this regard in *Haverfield Co.* v. *Evatt* (1944), 143 O. S. 58.

Within the year (1944), the Tax Commissioner instituted the present proceedings against appellant (R. 37) in order to test the validity of Sections 5328-1 and 5328-2, as interpreted by the Court in the *Ransom & Randolph* and *Haverfield* cases, when applied to the receivables of a nonresident. Similar proceedings were begun at about the same time against National Distillers Products Corporation and United States Gypsum Company. These are the only cases involving the situs for property taxation of receivables belonging to non-residents decided by the Ohio Supreme Court since 1932.

These cases were not decided by the Board of Tax Appeals until 1947 and on August 4, 1948 the Ohio Supreme Court affirmed the decision of the Board in this case that appellant's receivables are taxable in Ohio because (a) they were used in business generally, and (b) resulted from the sale of property from a stock of goods maintained in Ohio within the meaning of Section

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avails thereof must be used principally if not exclusively in the state of origin.

Such rule also exceeds the terms of Section 5325-1; General Code, which clearly states that where 'avails' of intangibles are applied or are intended to be applied in the conduct of the business, *whether in this state or elsewhere*, the intangibles shall be considered to be 'used.'

There is no justification for limiting the word 'business' to that part of the business done in states other than Ohio. (Section 5325-1, General Code.)

In addition to the statutes and rule of the Tax Commissioner the Board of Tax Appeals relied upon 'the general rule otherwise applicable in cases of this kind.'

When an unambiguous statute changes the common law on any subject, such statute is to be followed to the exclusion of any general rule otherwise applicable to cases coming within the purview of the statute." (*Ransom & Randolph* v. *Evatt*, 142 O. S. 408, 409.)

5328-2. The Board's decision in this regard reads (R. 70, 71) as follows:

> "Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this State and elsewhere, they must be held to be used in business within the meaning of this statute. *Ransom & Randolph Co.* v. *Evatt*, 142 O. S. 398, 27 O. O. 348, 37 O. L. A. 481, 10 O. Supp. 25, 52 N. E. (2d) 738; *Haverfield Company* v. *Evatt*, 143 O. S. 58, 28 O. O. 16, 54 N. E. (2d) 149.
> * * *
>
> This reciprocal provision[5] indicates a policy to treat residents and nonresidents alike with respect to the taxation of intangibles used in business. In the above two cases no constitutional question was involved since the State would have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes, therefore, the rule adopted by the Supreme Court must be applied to nonresidents. It is claimed, however, that to apply this rule to nonresidents would render section 5328-2, General Code, unconstitutional. *Hillsborough Township* v. *Cromwell*, 90 L. Ed. 298; *Schwartz* v. *County Board of Taxation*, 129 N. J. L. 129 affirmed 130 N. J. L. 177. As stated before, the Board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court."

As a result of the Court's decisions in the *Ransom & Randolph* and *Haverfield* cases and in the instant case,

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5. "Section 5328-2. * * *

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances."

under Ohio law the taxability of receivables is a matter of legislative fiat and not of common law *business situs*, as counsel for the Tax Commissioner contend that it is. That it was the intent of the Ohio General Assembly that all intangible property having a *business situs* in Ohio should be taxed in Ohio and that no intangible property having a *business situs* outside of Ohio should be taxed in Ohio is undoubtedly true, as counsel for the Tax Commissioner contend; but that is not what the statutes in question mean according to the decisions of the Ohio Supreme Court. As stated in the opening brief for appellant, the decisions in the *Ransom & Randolph* case, and in this case, read in conjunction, make it crystal clear that the Ohio Supreme Court has decided that Sections 5328-1 and 5328-2 require that accounts receivable of a resident, when and wherever used in business, be exempted from taxation in Ohio:

> (a) if resulting from the sale of property sold by an agent having an office in a state other than Ohio, or
>
> (b) if resulting from the sale of property from a stock of goods maintained in a state other than Ohio;

and (2) that accounts receivable of a non-resident, when and wherever used in business, be taxed in Ohio:

> (a) if resulting from the sale of property sold by an agent having an office in Ohio, or
>
> (b) if resulting from the sale of property from a stock of goods maintained in Ohio.

This Court has repeatedly said that it is bound by the construction placed upon a state taxing statute by the highest court of the state. *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 93.

None of the decisions of the Ohio Supreme Court cited in the Brief of Appellee are inconsistent with the *Ran-*

som & Randolph decision and for the most part are not even pertinent. *National Cash Register* v. *Evatt*, 145 O. S. 597, and *Kettering, Inc.* v. *Evatt*, 144 O. S. 419 are franchise tax cases. *American Rolling Mill Co.* v. *Evatt*, 147 O. S. 207, involves the situs of bank deposits of a domestic corporation and a different test is applied to determine the taxability of deposits than in the case of receivables. *Procter & Gamble* v. *Evatt*, 142 O. S. 369, was decided before the *Ransom & Randolph* case and the decision is not in point.

2. The Decision of the Supreme Court of the United States in Wheeling Steel Corporation v. Fox.

It is said in the Brief of Appellee (p. 26), with reference to the decision of this Court in *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, that: "The decision of this court in *Wheeling Steel Corp.* v. *Fox*, supra, is entirely favorable to the commissioner. It holds (1) that appellant's receivables and intangibles are subject to taxation in Delaware, even though there is in neither case any evidence that Delaware exercised its taxing power, and (2) that its receivables arising from its sales and shipments from its Ohio plants were subject to the Ohio tax and its receivables were subject to tax and were taxed in West Virginia after giving credit for Ohio taxes paid on intangibles." This statement is a little wide of the mark.

All of appellant's intangibles were assessed for taxation in West Virginia on January 1, 1931 under a statute[6] requiring the assessment of intangible property of a foreign corporation having its principal place of business in the state, unless the property was shown to be

6. Code 1931, 11-3-12, as amended by the legislature, Acts First Extraordinary Session 1933, Chapter 38, and Code 1931, 11-3-13.

primarily liable for taxation in some other jurisdiction. The Supreme Court of Appeals affirmed the assessment (*In Re Wheling Steel Corporation Assessment*, 115 W. Va. 553) except as to receivables which had been returned for taxation in Ohio, and which the Court said it would assume for the purposes of the opinion were properly taxable in Ohio.

This Court affirmed the West Virginia Court (*Wheeling Steel Corp.* v. *Fox*, supra), holding that the state statutes, as construed and applied, did not deprive appellant of due process of law nor of the equal protection of the laws of the state.

In the argument of the case, counsel for Wheeling pointed to the extent of the company's manufacturing properties and operations in Ohio and argued that if the company's receivables were subject to taxation in any state other than Delaware, they were taxable in Ohio. It was in response to this argument that this Court said (298 U. S. 212, 213):

> "The Corporation has manufacturing plants and sales offices in other States. But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government.
>
> "The question here is not of the taxation of the plants in other States. The real estate, equipment and all tangible property there located is taxable by those States respectively. The accounts receivable with which we are now concerned are the proceeds of contracts of sale. While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are

kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned. Such a tax on net gains is distinct from an ad valorem property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions. Here, the tax is a property tax on the accounts receivable, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned and used in production of material for sale.' This is to confuse two distinct subjects of ad valorem property taxation, the accounts receivable which arise from sales and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale."

However, this Court pointed out that the Tax Commissioner of West Virginia had not appealed from the decision of the state court allowing the deduction from the assessment of the accounts taxed in Ohio and refused to disturb the decision of the West Virginia Court in this regard. In that connection this Court said (298 U. S. 215):

"Upon this record the question before us is with regard to the constitutional validity of the tax as

assessed in West Virginia and not as to the amount or validity of any tax assessed elsewhere."

It is apparent that, contrary to the statement in the Brief of Appellee, the Court did not decide in the *Fox* case that receivables arising from appellant's sales and shipments from its Ohio plants were subject to taxation in Ohio.

In concluding the opinion in the *Fox* case, the Court said (298 U. S. 216) that:

> "The decision in the instant case, as we have seen, is not that the statutes require taxation in West Virginia of all of the intangibles of appellant, without due regard to the place where they may properly be deemed to be localized, but only of such intangibles as upon the facts and the law, according to the course of business, may be deemed to be within the jurisdiction of the State."

As stated in appellant's opening brief, it is not appellant's claim that the *Fox* case bars Ohio or any other state from taxing appellant's receivables upon a proper showing of jurisdiction over them. What appellant does claim is that Ohio has made no such showing in the present case. The evidence in this case is not sufficient to establish the localization of the receivables in question in Ohio.

3. Benefits and Protection conferred by Ohio upon Appellant's Property.

Though they assert in general terms that Ohio conferred numerous benefits and protections upon appellant, opposing counsel neglect to specify what benefits and what protections appellant received from Ohio *in respect of the intangibles in issue in this case*. To be sure, ap-

pellant owned substantial property in Ohio,[7] as is set out in the stipulation. It owned both real and personal property, and paid taxes thereon. Furthermore, it was admitted to do business and did business in Ohio. For that privilege appellant paid the franchise tax imposed by Section 5495, of which the Ohio Supreme Court said in *Aluminum Co. v. Evatt*, 140 O. S. 385, 392:

> "Under Section 5495, General Code, the franchise or excise tax authorized by Section 5499, General Code, and determined according to Section 5498, General Code, is levied upon foreign corporations 'for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.'"

In short appellant paid the stipulated price for the privilege of owning property and doing business in Ohio.

Appellee has not specified and appellant has been unable to discover any benefits accorded it by Ohio in respect of the intangibles in question which were not freely available to every other non-resident of every one of the other 47 states. Appellant could have had recourse to the courts of Ohio to enforce one or more of these receivables. But in that regard it was in no better position than all other non-residents who equally could have had recourse to the courts of Ohio, and without liability for property taxes in respect of their intangibles. So, too, appellant could have resorted to the courts of all the other states but assuredly that fact did not invest them

7. Appellant's subsidiaries, Wheeling Corrugated Company and Consolidated Expanded Metal Companies had warehouses in Columbus and Cleveland, respectively, not sales offices as claimed in the Brief for Appellee (p.8).

with jurisdiction over it. If it did, appellant and every other taxpayer is subject to the simultaneous exactions of 48 states.

In sum, appellant paid for what it got and objects to paying for unspecified additional benefits which in fact Ohio was in no position to deliver.

CONCLUSION

It is the purpose of this Reply Brief to bring into focus the real question in this case, which is: May the state of Ohio collect from appellant, a foreign corporation authorized to do business within its borders, an ad valorem tax in respect of notes and accounts receivable (a) whose only link with Ohio is the fact that they can be traced back to sales of products delivered from appellant's manufacturing plants in Ohio, and (b) notwithstanding that

(1) the sales giving rise to the receivables resulted in the main from purchase orders placed by customers at sales offices maintained by appellant in 12 states, which were forwarded by mail from the originating sales offices to the principal office in Wheeling, West Virginia;

(2) the purchase orders in every instance were subject to acceptance and were in fact accepted at the principal office in Wheeling;

(3) the notes and other documents evidencing the receivables were at all times kept in Wheeling and were at all times under the control of appellant's treasurer in that city;

(4) the receivables in every instance were payable at Wheeling and were there paid;

(5) the proceeds of the receivables, when paid, were under the supervision and control of appellant's treas-

urer in Wheeling and were there drawn upon for the general purposes of the business;

(6) the identical receivables would not be taxable if appellant were an Ohio corporation, the Ohio Supreme Court having held that intangibles of the same sort arising, held and used in precisely the same manner are exempt if they belong to a domestic corporation, taxable if they belong to a foreign corporation.

Respectfully submitted,

CARLTON S. DARGUSCH,
JOHN M. CAREN,
Columbus, Ohio,
WRIGHT HUGUS,
J. E. BRUGE,
Wheeling, W. Va.,
Attorneys for Appellant.

Of Counsel:

DARGUSCH, CAREN, GREEK & KING,
44 E. Broad St., Columbus 15, Ohio.
SCHMIDT, HUGUS & LAAS,
Central Union Bldg., Wheeling, W. Va.